Supreme Court, U. S.
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In the Supreme Court of the United States

TERM,

No. 75-34

COLIN F. BEATON AND ELEANOR M. BEATON,
APPELLANTS,

v.

JUDGES OF THE LAND COURT, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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COLIN F. BEATON AND ELEANOR M. BEATON,
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JUDGES OF THE LAND COURT, ET AL.,
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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The Appellants Colin F. Beaton and Eleanor M. Beaton appeal from the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on April 10, 1975.

Opinions Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is officially reported at 1975 Mass. Adv. Sh. 1005 and unofficially reported at 326 N.E. 2d 302. The opinion is reproduced in the Appendix at p. 19.

Jurisdiction

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on April 10, 1975. (A. 18). A Notice of Appeal to this Court was filed in the Supreme Judicial Court for the Commonwealth of Massachusetts on June 5, 1975 (A. 29). The Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(2).

Question Presented

Whether the construction of St. 1943 Section 57 of the Laws of the Commonwealth of Massachusetts as amended by St. 1959 c. 105 to prohibit a mortgagor, named as a defendant and served with notice to appear in a proceeding to foreclose a mortgage on his real estate, from appearing in the proceeding to contest the existence of a default on the mortgage, from filing an answer raising defenses to foreclosure and from being heard prior to foreclosure on issues raised in the answer, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutional Provisions and Statutes Involved

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ACTS, 1943, CHAPTER 57

St. 1943, c. 57, § 1 provides in pertinent part:

SECTION 1. In any proceeding in equity for authority to foreclose a mortgage, which for the purposes of this act shall be construed to include a trust deed, or other security in the nature of a mortgage, covering real or personal property, or both, by entry and possession, by exercise of a power of sale contained therein, or otherwise as provided by law, or to make any seizure of property thereunder, brought because of an Act of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, or any amendments thereto hereafter enacted, notice may be issued in substantially the following form by the court in which such proceeding is pending, returnable on any convenient date, irrespective of the return days otherwise prescribed by law or rule, and requiring all appearances and answers to be filed on or before the return day:—

COMMONWEALTH OF MASSACHUSETTS

..... COURT

....., ss. In Equity

To (insert the names of all defendants named in the bill) *and to all whom it may concern:*

..... claiming to be the holder of a mortgage —trust deed—security in the nature of a mortgage (strike out the descriptive words which are inapplicable) covering ..... property (insert nature of property, whether real or personal) situated in (insert location of property,

including name of city or town and, if stated in the mortgage or in the bill, the street and number) given by (insert names of parties, date and reference to record), has filed with said court a bill in equity for authority to foreclose said mortgage—trust deed—security in the nature of a mortgage—in the manner following: (insert contemplated method of foreclosure, whether by entry and possession, exercise of a power of sale, or otherwise)—to seize certain real—personal—property (strike out descriptive word which is inapplicable) covered by said mortgage—trust deed—security in the nature of a mortgage.

If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, and you object to such foreclosure or seizure, you or your attorney should file a written appearance and answer in said court at ..... on or before ..... (Return Day), or you may be forever barred from claiming that such foreclosure or seizure is invalid under said act.

Witness ..... Esquire, Judge of said Court, this ..... day of ..... 19 . .

The publication of a copy of said notice once not less than twenty-one days before the return day in a newspaper designated by the court, and the mailing of a copy thereof by registered mail not less than fourteen days before the return day to each defendant named in the bill, shall be sufficient service of said notice, unless the court otherwise orders, provided however that prior to the return day fixed in said notice a copy thereof shall be recorded in each registry of deeds and city or town clerk's office in which such mortgage is recorded.

SECTION 2. An entry and possession taken for the purpose of foreclosure, or a foreclosure effected by exercise of a power of sale or by any other method, or a seizure of property, done pursuant to authority granted in such proceedings, may be approved by the court but not until after

the expiration of the period for appeal from the order authorizing the same. There shall be no appeal from or review of such approval.

The period of thirty days within which a copy of the notice of sale and an affidavit are required to be recorded by section fifteen of chapter two hundred and forty-four of the General Laws, and the period of thirty days within which the memorandum or certificate of entry is required to be recorded by section two of said chapter two hundred and forty-four shall, in case such a proceeding has been had, be computed from the time the court approves the sale, or entry, rather than from the time of the sale, or entry, as provided in said sections.

A copy of the order authorizing foreclosure by entry, or by sale, or otherwise as provided by law, or a copy of the order authorizing the seizure of property, and the approval thereof, may be recorded in the registry of deeds and city or town clerk's office in which such mortgage is recorded, and if so recorded shall be conclusive evidence of compliance with the provisions of said Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto, in so far as the court has power to determine the same, as against all persons, except that such copy shall not be conclusive evidence of such compliance against persons whose interests appeared of record prior to the recording of the notice of said proceeding unless they were named as defendants or had notice of said proceeding.

SECTION 3. In proceedings, under section one hereof where a mortgage includes land, the land court shall have jurisdiction as to said mortgage even though it may include personal property and shall have jurisdiction as to any additional or supplementary mortgage securing the same obligation although such mortgages include personal property.

SECTION 4. Chapter twenty-five of the acts of nineteen hundred and forty-one is hereby repealed, but the repeal thereof shall not be construed to affect any proceedings which shall have been brought heretofore under said chapter twenty-five.

ACTS, 1959, CHAPTER 105

St. 1959, c. 105 provides in pertinent part:

SECTION 1. The form of notice in section 1 of chapter 57 of the acts of 1943 is hereby amended by striking out the salutation or greeting and inserting in place thereof the following:—

To (insert the names of all defendants named in the bill) *and to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended:*

SECTION 2. Said section 1 of said chapter 57 is hereby further amended by adding at the end the following paragraph:—

In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any.

Statement

Appellants, Colin F. Beaton and Eleanor M. Beaton, hereafter "the Beatons", are husband and wife and the owners in fee as tenants by the entirety of certain land in Bridgewater, Massachusetts (Petition for Writ of Mandamus, para. 4). On October 10, 1966 the Beatons mortgaged said land to Appellee, Quincy Oil Co., presently Quinoil Industries, Inc., hereafter "Quinoil" (Petition, para. 4; a copy of the mortgage is Exhibit "I" to the Petition). Appellees "Randall and Sullivan" are the Judges of the Massachusetts Land Court. (Petition, para. 2). The Massachusetts Land Court is a court of record created by Chapter 185 of the General Laws of the Commonwealth of Massachusetts.

On September 12, 1973 the Beatons commenced in the Plymouth Superior Court a proceeding to discharge and to redeem the mortgage given by them to "Quinoil". (Exhibit IV to Petition for Writ of Mandamus) "Quinoil" appeared and filed an Answer in the Plymouth proceeding. (Exhibit IV to Petition for Writ of Mandamus). On February 20, 1974 Quinoil commenced in the Land Court a Bill to foreclose the same mortgage upon which issue had been joined in the Plymouth Superior Court proceeding naming the Beatons as respondents. (Petition, para. 5; a copy of the Bill to Foreclose is Exhibit "II" to the Petition). In its Bill to Foreclose "Quinoil" prays: "1. For an order of notice ordering the respondents to appear and to answer this petition; 2. For a decree authorizing petitioner . . . to foreclose the mortgage described in paragraph 1 of this petition by a sale under the power of sale therein contained." The Bill to Foreclose makes no mention of the Bill to discharge and to redeem the mortgage pending in the Plymouth Superior Court. An order of notice was issued by the Land Court naming

the Beatons as respondents and was served on the Beatons. (Petition, para. 5; a copy of the order of notice is Exhibit "III" to Petition).

On April 8, 1974, the designated Land Court return day, the Beatons presented their Answer to the Bill to Foreclose to the Deputy Recorder of the Land Court, who immediately, without accepting the said Answer for filing, referred the answer to "the Judges of the Land Court". (Petition, para. 6).

On that same day "the Judges of the Land Court" denied the Beatons Motion with Answer attached that their Answer to the Bill to Foreclose be accepted for filing solely on the ground of St. 1959, c. 105 which provides as follows:

> "SECTION 1. The form of notice in section 1 of chapter 57 of the acts of 1943 is hereby amended by striking out the salutation or greeting and inserting in place thereof the following:—
> *To* (insert the names of all defendants named in the bill) *and to all persons entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended:*
>
> "SECTION 2. Said Section 1 of said chapter 57 is hereby further amended by adding at the end the following paragraph:—
>
> In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of

> the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, it any."

(Petition, para. 6, 7; the Motion with Answer attached is Exhibit "IV" to Petition). Paragraph (I) of "the is Exhibit "IV" to Petition). Paragraph (I) of the Beatons' Land Court Answer raised the federal question as follows:

> "I. The Unconstitutionality of St. 1959, c. 105
>
> The defendants Colin F. and Eleanor M. Beaton say that the provisions of St. 1959, c. 105 (and the order of notice herein issues pursuant to said statute) which purport to deprive named defendants of the right to appear and be heard, constitute an invasion of the rights of said defendants in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution."
>
> (Exhibit IV to Petition)

Paragraph II of the Beatons' Land Court Answer alleges that on September 12, 1973, approximately six months prior to the filing of the Bill to Foreclose in the Land Court, the Beatons filed in the Superior Court for Plymouth County a Bill in Equity to redeem and discharge the real estate mortgage in question and that Quinoil claims in the Land Court proceeding should be litigated in the Plymouth Superior Court proceeding.

Paragraph III of the Beatons' Land Court Answer alleges that there is no breach of condition of the mortgage and incorporates by reference the allegations of the Bill in Equity pending in the Plymouth Superior Court.

The Beatons subsequently filed in the Supreme Judicial Court for Suffolk County this Petition for a Writ of

Mandamus seeking an order to compel "the Judges of the Land Court" to cause to be accepted for filing as of April 8, 1974 their answer and to adjudicate the issues raised.

Paragraph 8 of the Petition raised the federal question as follows:

> "8. Petitioners hereby reiterate the claim asserted in their Land Court answer, that the provisions of St. 1959, c. 105 which purport to deprive named defendants of the right to appear and be heard, constitute an invasion of the rights of said defendants in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution."

"Quinoil" and "the Judges of the Land Court" each filed Demurrers and Answers. All proceedings in the Land Court were stayed by stipulation of "the Judges of the Land Court" pending determination of the Petition on the merits. After hearing the single justice entered an Order Sustaining the Demurrers. (A. 31) The Beatons appeal from the judgment of the Supreme Judicial Court for the Commonwealth entered on April 10, 1975 affirming that order. (A. 29).

The Question Is Substantial

ST. 1943, SECTION 57, OF THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS AS AMENDED BY STATUTE 1959, C. 105, AS CONSTRUED BY THE COURT BELOW TO PROHIBIT A MORTGAGOR FROM APPEARING AND DEFENDING IN A PROCEEDING TO FORECLOSE A MORTGAGE ON HIS REAL ESTATE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Approximately *six months after* Colin Beaton and Eleanor Beaton, husband and wife, filed in the Massachusetts

Superior Court for Plymouth County, a Bill to discharge and to redeem a mortgage given by them to Quinoil on their residence in Bridgewater on October 10, 1966, Quinoil filed in the Massachusetts Land Court a Bill to Foreclose the same mortgage under the provisions of St. 1943, section 57 of the Laws of the Commonwealth of Massachusetts, as amended by St. 1959, c. 105. The Bill to Foreclose was totally silent as to the Bill pending in the Plymouth Superior Court to discharge and redeem the mortgage. The court below holds that the Beatons have no right to appear *for any purpose* in this subsequent Land Court proceeding. (1975 Mass. Adv. Sh. 1005, A. 24, 28).

To the extent the Court below suggests that the extraordinary limitation placed on the Beatons' appearance in the Land Court proceeding is compelled by The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. section 532, this is obviously not so. (A. 20, footnote 4). In fact, prior to the 1959 Amendment (St. 1959, c. 105) mortgagors not necessarily entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 are found appearing in such proceedings in the Superior Courts for the Commonwealth of Massachusetts, answering, and litigating varied defenses. *Lynn Institution for Savings* v. *Taff*, 314 Mass. 380; *State Realty Co. of Boston* v. *MacNeil Bros.*, 334 Mass. 294; *Piea Realty Co.* v. *Papuzynski*, 342 Mass. 240. It is the 1959 Amendment which, for the first time, purports to prohibit such appearances.

The Court below states that the Beatons have no right to appear or to raise defenses in this subsequent Land Court foreclosure proceeding because the Beatons are not soldiers or sailors and the proceeding is, under the terms of the 1959 amendment, limited to ". . . the existence of such persons (soldiers and sailors) and their rights, if any." (A. 20, 21).

Accepting this construction of St. 1943, section 57 as amended by St. 1959, c. 105, a vital property right of the Beatons is nevertheless affected. This is so because the Land Court foreclosure proceeding necessitates a judicial determination that a breach of condition of the mortgage given by the Beatons exists. The existence of and the status of that mortgage is the sine qua non of the proceeding.

The Bill to foreclose filed in the Land Court proceeding alleges, as it must, that such a breach of condition of the mortgage does in fact exist. (Petition for Writ of Mandamus, para. 5; the Bill to Foreclose is Exhibit "II" to the Petition). Without proof of and a judicial determination that there has been a breach of condition of the mortgage the Land Court proceeding, accepting the limited character ascribed to it by the state court, becomes a dangerous judicial exercise.

The comprehensive final decree to be entered in the Land Court proceeding furnishes clear evidence that such a determination of default is in fact made. Under the terms of St. 1943, section 57 the Recorder of the Land Court enters a decree authorizing and later a decree approving the sale of the Beatons' real estate. The pertinent provision of St. 1943, section 57 provides as follows:

> "Section 2. An entry and possession taken for the purpose of foreclosure, or a foreclosure effected by exercise of a power of sale or by any other method, or a seizure of property, done pursuant to authority granted in such proceedings, may be approved by the court but not until after the expiration of the period for appeal from the order authorizing the same. There shall be no appeal from or review of such approval."

The court below misapprehends Appellants' position when it states as follows:

> "The Petitioners, however, urge us to rule that St. 1959, c. 105, is unconstitutional as permitting a taking of property without due process of law. The argument seems to be that the state, by restricting the issues which may be raised in a proceeding under the statute solely to a determination of the existence of servicemen, and their rights under the 1940 Relief Act, denies a mortgagor the opportunity to appear and raise other defenses which might invalidate the foreclosure." (A. 22)

This statement is obviously too narrow a statement of the Beatons' position. Accepting the statement of the court below as to the limited nature of the issues raised, beyond the defenses which the Beatons seek to present by their proffered answer, there must be a determination in the Land Court proceeding as part of the mortgagee's prima facie case that the Beatons' mortgage is in fact in default. That determination, if no other, effects the Beatons' property right in the Bridgewater real estate and requires that the Beatons be heard on that issue, if on no other. In prohibiting the Beatons' appearance altogether, the court below mistakenly relies on decisions of this court upholding statutes providing for defendant's appearance on substantial but limited issues. (*e.g.*, to show payment of a mortgage or payment of rent) *Bianchi* v. *Morales*, 262 U.S. 170; *Lindsey* v. *Normet*, 405 U.S. 56. It is submitted that statutes affecting substantial rights while prohibiting defendant's appearance for any purpose clearly present a different case.

By its determination that there is in fact a breach of condition of the mortgage and by its contemplated decree

authorizing and then approving the sale of the Beatons' real estate in Bridgewater pursuant to said determination, the Land Court proceeding, accepting its limited character as defined by the court below, deprives the Beatons of a vital property right. *Fuentes* v. *Shevin,* 407 U.S. 75. This court is the final judge of whether the final decree to be entered in the Land Court proceeding under St. 1943, § 57 as amended affects a property right of the Beatons within the meaning of the Fourteenth Amendment.

The court below states that assuming a property right of the Beatons is affected, as it obviously is, the prohibition of the Beatons' appearance in the Land Court proceeding in any case raises no due process question because the Beatons will be afforded a hearing prior to foreclosure. The court below so insists despite its own holding that the Bill to foreclose may proceed in the Land Court without an opportunity to the Beatons to appear and despite the existence of a prior pending Bill to redeem and discharge the same mortgage:

> "This (restricting the Beatons from raising defenses in the Land Court proceeding), however is of no constitutional significance, since other adequate procedures are available to the mortgagors in the same or another forum *where these issues may be raised prior to the mortgagor's loss of his possessory or other important rights in the property subject to the mortgage.*" (our italics) (A. 24) . . . . .
>
> "We emphasize that the petitioner unquestionably have available methods of preventing foreclosure if they do in fact have a defense to foreclosure." (A. 26) . . . . .
>
> "Finally, we note that even if the mortgagor does violate the conditions of the mortgage, and the mortgagee commences foreclosure proceedings, the mortgagor still may redeem the mortgaged property and obtain an accounting by appropriate proceedings before the foreclosure is completed." (A. 27)

What the court below does not and cannot state is when and by what provisions of Chapter 244 of the General Laws of the Commonwealth of Massachusetts, St. 1943, § 57 as amended, or any other law of the Commonwealth of Massachusetts this prior hearing *must* take place. In fact, the construction placed on St. 1943, § 57 by the court below effectively precludes the sole procedure available under Massachusetts law on the facts of this particular case to *assure* that such a prior hearing takes place. The foreclosure of the Beatons' mortgage is initiated before the Bill to redeem and to discharge the mortgage pending in the Plymouth Superior Court can be heard.

The court below recognizes that a prior hearing is not *compelled* under any other law of the Commonwealth of Massachusetts. If a prior hearing were compelled there would obviously be no need for the injunctive relief in the prior Bill to redeem and discharge the mortgage pending in the Plymouth Superior Court to which the court below directs the Beatons. (A. 26). Such injunctive relief under Massachusetts law is, of course, purely discretionary and therefore cannot assure a prior hearing. *Yakus* v. *U. S.,* 321 U.S. 414; *Bendslev* v. *Commissioner of Public Safety,* 328 Mass. 443; *Martin* v. *Murphy,* 216 Mass. 466.

Aside from the discretionary character of injunctive relief, the procedural inadequacy of injunctive relief in due process terms was clearly recognized in *Turner* v. *Blackburn,* in which the court held that the North Carolina foreclosure state violated the due process clause as applied:

> "As to time of hearing, in this kind of case, which presents no extraordinary situation, the mortgagor must 'be given an opportunity for a hearing *before*

he is deprived of any significant property interest . . .' *Boddie, supra,* 401 U.S. at 379, 91 S.Ct. at 786 (footnote omitted). The right to submit an upset bid is obviously not a hearing. The extraordinary injunctive relief available under § 45-21.34 does not suffice because (1) the burden of proof is clearly on the mortgagor; (2) he most likely must show irreparable damage, as the inadequacy of the bid and (3) a condition precedent to relief is a bond providing for full indemnification. . . .'' *Turner* v. *Blackburn,* 389 F. Supp. 1250 (1975)

In *Turner* v. *Blackburn,* a divided three judge court held that due process required that a mortgagor be accorded a hearing prior to foreclosure. The decision of the court below conflicts with the decision in *Turner* v. *Blackburn.* Appellants are informed that an appeal has been taken to this Court from that decision. The decision below similarly conflicts with *Northrip* v. *Federal National Mortgage Association,* 372 F. Supp. 594 (1974) and *Gamer* v. *Tri-State Development Company,* 382 F. Supp. 377 (1974), which held that the advertising and sale provisions of the foreclosure statute of the State of Michigan violated due process as applied since no provision was made for a hearing prior to foreclosure.

The decision below obviously conflicts in principle with *Fuentes* v. *Shevin,* 407 U.S. 67 and *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337, in which this court found violative of due process state pre-judgment statutes which involved temporary takings and which ultimately provided for defendant's appearance and answer. The construction of St. 1959, c. 105 by the court below to prohibit the Beatons' appearance for any purpose in a judicial proceeding predicated on the existence of a default in a mortgage given by them similarly violates the

due process clause of the Fourteenth Amendment to the Constitution of the United States.

Conclusion

For the reasons stated above, the court should note jurisdiction and set the matter for argument.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

No. 17

SUFFOLK COUNTY

RESCRIPT

AT BOSTON, April 10, 1975.

IN THE CASE OF
COLIN F. BEATON & another
vs.
LAND COURT & another
pending in the Supreme Judicial Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Order affirmed. The respondents are to have double costs of appeal.

BY THE COURT,
FREDERICK J. QUINLAN, Clerk.

April 10, 1975.
Brief statement of the grounds and reasons of the decision: See opinion on file.

A true copy,
Attest:
FREDERICK J. QUINLAN, Clerk.

APPENDIX B

COLIN F. BEATON ET AL.[1]
v.
LAND COURT ET AL.[2]

Supreme Judicial Court of Massachusetts,
Suffolk.

Argued Jan. 6, 1975.
Decided April 10, 1975.

Daniel H. Kelleher, Boston (Saul E. Lipnick, Boston, with him), for petitioners.

Blair L. Perry, Boston, for Quinoil Industries, Inc.

Robert H. Quinn, Atty. Gen., for the Land Court and others.

Before TAURO, C.J., and REARDON, QUIRICO, HENNESSEY and WILKINS, JJ.

QUIRICO, Justice.

This is an appeal by the petitioners from a May 16, 1974, order of a single justice of this court sustaining demurrers to a "Petition for Writ of Mandamus."[3] The appeal is utterly without merit. We briefly review the facts and proceedings leading to this appeal.

[1] According to the petition, the factual allegations of which are accepted as true when ruling on a demurrer,

---

[1] The other petitioner is Eleanor M. Beaton.

[2] The other respondent is Quinoil Industries, Inc.

[3] This petition was filed on April 17, 1974. Effective July 1, 1974, the writ of mandamus, along with many other writs, was abolished by our new rules of civil procedure, which govern proceedings before a single justice. Mass.R.Civ.P. 1, 1A, 81(b), ___ Mass. ___ (1974). As the Reporters' Notes to Rule 81(b) point out, however: "Burial of these antiques . . . does not mean elimination of the relief they afforded. It does mean that an application for such relief will henceforth be commenced like any other civil action under these rules, viz., by complaint and summons, with the former containing a prayer for the appropriate relief."

Slaney v. Westwood Auto, Inc., —— Mass. ——, ——[a] 322 N.E.2d 768 (1975), the petitioners owned certain land in Bridgewater. In 1966, they mortgaged this land to the respondent Quinoil Industries, Inc. (Quinoil). The mortgage provided: "This mortgage is upon the statutory condition . . . for any breach of which the mortgagee shall have the statutory power of sale." On February 20, 1974, Quinoil filed in the Land Court a document entitled "Bill to Foreclose Mortgage." Notice was then issued to the petitioners, certain specified other persons, and "to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended." This notice advised: "If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended and you object to such foreclosure you or your attorney should file a written appearance and answer in said court at Boston on or before the eighth day of April 1974, or you may be forever barred from claiming that such foreclosure is invalid under said act."

On April 8, 1974, the petitioners presented their purported answer to the bill to foreclose to the deputy recorder of the Land Court. Without accepting the answer for filing, the recorder referred it to the Judges of the Land Court (the Judges), whereupon the petitioners moved that their answer be accepted for filing. The Judges promptly denied this motion, solely on the ground of St. 1943, c. 57, as amended by St. 1945, c. 120, and St. 1959, c. 105. These statutes, in essence, establish a proceeding to satisfy the requirements of the Soldiers' and Sailors' Civil Relief Act of 1940 (the 1940 Relief Act), now 50 U.S.C. Appendix, § 501 et seq. (1970),[4] as amended. The statutes

[a] Mass.Adv.Sh. (1975) 175, 176.

[4] The Soldiers' and Sailors' Civil Relief Act of 1940 was enacted by Congress after the outbreak of World War II and at a time when the United States, although not then a belligerent, was engaged in a massive increase of its armed forces. Before World War II ended, over sixteen million men and women had served in the armed forces of the country during the war years. The 1940 Relief Act, adopted as a war emergency measure, was not repealed at the end of the war, and has continued in effect during all the thirty-five years to the present time. As a result every mortgage of real estate foreclosed in that period has necessitated the pre-foreclosure equity proceeding prescribed by St.1943, c. 57, as amended, adding both to the time and cost of each foreclosure. Although statistics are not available to us, it seems safe to say that the number of foreclosures which affect property interests of persons in the armed forces is currently minimal. Nevertheless, so long as the 1940 Relief Act continues in effect, the Commonwealth is not at liberty to eliminate pre-foreclosure proceedings to ascertain whether interested parties are in, or have just been released from, the service.

further provide that in such proceedings notice such as that sent to the petitioners must be issued to various concerned persons. By virtue of St. 1959, c. 105, § 2, "In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, . . . whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to the issues of the existence of such persons and their rights, if any." After their motion was denied, the petitioners sought a writ of mandamus, naming the Judges and Quinoil as respondents, to compel the Judges to cause the answer to be accepted for filing. Both respondents demurred to the petition. The single justice, ruling that in view of the provisions of St. 1959, c. 105, § 2, it would be futile to order the acceptance of the petitioners' answer, sustained the demurrers.

The answer which the petitioners attempted to file in the Land Court does not assert that the petitioners or any other concerned parties are entitled to the protection of the 1940 Relief Act. Neither does the answer raise the

issues of the existence of any such persons or of their rights.[5] Plainly, therefore, at least as far as the statutes are concerned, the Judges acted properly in denying the motion to compel the recorder to accept the answer. Equally plainly, as far as the statutes are concerned, the single justice properly sustained the demurrers to the petition for a writ of mandamus.

The petitioners, however, urge us to rule that St.1959, c. 105, is unconstitutional as permitting a taking of property without due process of law. Their argument seems to be that the statute, by restricting the issues which may be raised in a proceeding under the statute solely to a determination of the existence of servicemen, and their rights under the 1940 Relief Act, denies a mortgagor the opportunity to appear and raise other defenses which might invalidate the foreclosure. Without previously citing, much less discussing, a single case bearing on the due process limitations on the taking of an individual's property in this or any other context, the petitioners state: "Given the contemplated entry of a final decree in the Land Court proceeding authorizing the sale of 'the Beatons' real estate, the violation of due process in refusing to accept the Answer of 'the Beatons' for filing is so clear as to render unnecessary extensive discussion of less grievous due process violations recently found in summary state pre-judgment attachment, replevin and garnishment statutes which involved only 'temporary takings' and which ultimately provided for defendant's appearance and

[5] The answer which the petitioners attempted to file in the Land Court contained three matters: (a) a claim that St.1959, c. 105, and the order of notice issued thereunder are unconstitutional; (b) a defense that a bill in equity to redeem and discharge the mortgage had been filed by the petitioners' and was pending in the Plymouth Superior Court; and (c) a defense that there had been no breach of condition of the mortgage. The answer also purported to incorporate by reference all the multifarious claims raised in the bill in equity previously filed in the Plymouth Superior Court.

answer. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 [1972]; Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 [1969].... Given the clear violation of due process, it is not necessary to argue at length that the distinction created by the statute between those who are allowed to appear and to answer and those who are not is not reasonable and violates the equal protection clause of the Fourteenth Amendment. Fiorentino v. Probate Court, — Mass. —,[b] 309 N.E.2d 533 (1974).

[2] The conclusory nature of the petitioners' brief is such that it is doubtful whether it complies with the rule that the argument in an appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Mass.R.A.P. 16(a)(4) — Mass. — (1974). While the petitioners, as appellants, are not entitled to have issues not argued in the brief considered by this court, see Commonwealth v. Bernier, — Mass. —,[c] 322 N.E.2d 789 (1975), we nevertheless take this opportunity to point out the basic defects in their contentions.

[3, 4] The pertinent provision of the 1940 Relief Act, 50 U.S.C. Appendix, §532(3) (1970), renders the foreclosure of a mortgage after October 6, 1942, invalid in so far as it purports to cut off rights of a person in the military service or recently discharged therefrom unless that person has executed a proper waiver of his rights or the foreclosure is made "upon an order previously granted by the court and a return thereto made and approved by the court." The point to be made here is that actions taken to comply with the 1940 Relief Act, such as the steps prescribed by St.1943, c. 57, as amended, are not

[b] Mass.Adv.Sh. (1974) 403.
[c] Mass.Adv.Sh. (1975) 221, 226.

in themselves mortgage foreclosure proceedings in any ordinary sense. Rather, they occur independently of the actual foreclosure itself and of any judicial proceedings determinative of the general validity of the foreclosure. Statute 1943, c. 57, as amended, simply establishes procedures whereby mortgagees, in addition to taking all steps necessary to foreclose, can make certain that there will be no cloud on the title following the foreclosure as a result of an interested party having been in, or just released from, military service and thus under the protective umbrella of the 1940 Relief Act. See Lynn Inst. for Sav. v. Taff, 314 Mass. 380, 386, 50 N.E.2d 203 (1943). If a foreclosure were otherwise properly made, failure to comply with the 1940 Relief Act would not render the foreclosure invalid as to anyone not entitled to the protection of that act. Guleserian v. Pilgrim Trust Co., 331 Mass. 431, 433-434, 120 N.E.2d 193 (1954). See Park, Conveyancing, § 406 (1968 and Supp.1974).

[5] In view of the limited purpose of proceedings under the 1940 Relief Act, it is evident why it was appropriate for the Legislature, by St.1959, c. 105, to limit access to such proceedings to persons entitled to the benefits of the act or to persons appearing on their behalf, and to limit the issues in such proceedings to the existence of such persons and their rights, if any. It is true that these restrictions may prevent mortgagors from raising in these particular proceedings many meritorious issues pertaining to the mortgagee's ultimate right to foreclose. This, however, is of no constitutional significance, since other adequate procedures are available to the mortgagor in the same or another forum where these issues may be raised prior to the mortgagor's loss of his possessory or other important rights in the property subject to the mortgage. In other words, mandatory procedural segregation of various aspects of related claims or defenses is constitutionally

permissible so long as all the available procedures combined satisfy the mandates of the due process clause. Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133, 35 S.Ct. 279, 59 L.Ed. 501 (1915) (upholding a Louisiana statute which prohibited the defendant in a possessory suit from bringing an action to try title until after the judgment was rendered and satisfied in the possessory action). Bianchi v. Morales, 262 U.S. 170, 43 S.Ct. 526, 67 L.Ed. 928 (1923) (upholding a Puerto Rico mortgage statute permitting a summary possessory suit by a mortgagee in which no defense except payment was generally permitted). Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (upholding an Oregon statute which, in essence, restricted a tenant-defendant in a landlord's possessory action based on nonpayment of rent to the defense of payment).

As just noted, the recent *Lindsey* decision upheld a statute which prohibited a tenant from raising any defense but payment when sued by the landlord in a possessory action based on nonpayment of rent. The Supreme Court said that Oregon does not "deny due process of law by restricting the issues in . . . [the statutory] actions to whether the tenant has paid rent . . . The tenant is barred from raising claims in the . . . [statutory] action that the landlord has failed to maintain the premises, but the landlord is also barred from . . . asserting other claims against the tenant. The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." 405 U.S. at 65-66, 92 S.Ct. at 870 (1972). The effect of the Oregon statute upheld in the *Lindsey* case was to prevent a tenant from raising many possible defenses in an action which could result in his being deprived of a fundamental, vital property interest—the possession of a dwelling or place of business. The effect of the Massachusetts legislation here at issue is, by contrast, merely to prevent a mortgagor from

raising certain defenses in an action which can result only in a determination that interested parties are not entitled to the limited benefits of the servicemen's protective statute.

[6-8] We emphasize that the petitioners unquestionably have available methods of preventing foreclosure if they do in fact have a defense to foreclosure. The answer the petitioners attempted to file in the Land Court purported to incorporate by reference a bill in equity filed in the Plymouth Superior Court. See fn. 5, *supra*. This bill in equity seems to assert, among other things, that the actions of the mortgagee Quinoil, in connection with certain business transactions which allegedly served as the basis for the execution of the mortgage, constituted actionable fraud. One element of the relief sought from this alleged fraud is that Quinoil be ordered to discharge the mortgage and that the petitioners be relieved of any personal liability to the respondent Quinoil. While we have no intention of here ruling on the adequacy of this bill, we do note that a court acting under general principles of equity jurisprudence has broad power to reform, rescind, or cancel written instruments, including mortgages, on grounds such as fraud, mistake, accident, or illegality. Rice v. Winslow, 182 Mass. 273, 275-276, 65 N.E. 366 (1902). Hermanson v. Seppala, 255 Mass. 607, 610, 152 N.E. 363 (1926). Brodie v. Evirs, 313 Mass. 741, 744, 49 N.E.2d 218 (1943). If the obligation underlying the mortgage has been paid or otherwise discharged, the mortgagor may maintain a suit to compel the cancellation of the note and a discharge of the mortgage in a form appropriate for recording. Perry v. Oliver, 317 Mass. 538, 541, 59 N.E.2d 192 (1945). If a mortgagee begins the process of foreclosure, a suit in the Superior Court will lie to enjoin the foreclosure and to obtain an accounting. In such a suit, the issue whether the mortgage conditions have been violated may be litigated. McCombs v. Elmes, 197 Mass. 19, 21-22, 83 N.E. 306

(1907). See Newman v. Greenberg, — Mass. —,[d] 281 N.E. 2d 590 (1972).

[9] It does not appear possible in this Commonwealth that a foreclosure could ever be made without the mortgagor's having first received some form of notice of the proposed foreclosure and an opportunity to oppose it. If the foreclosure is to be by exercise of a power of sale, G.L. c. 244, § 14, provides that notice of the proposed sale must first be published in a local newspaper once a week for three successive weeks prior to the date of the sale. If the foreclosure is to be by entry for breach of condition, it will not be completed until three years have passed from the date of a peaceable, unopposed entry, and a certificate of entry must be recorded in the registry of deeds within thirty days from the date of entry. G.L. c. 244, §§ 1, 2. If the foreclosure is to be by action under G.L. c. 244, §§ 3, 4, a method rarely used, the ordinary procedural rules, including those pertaining to service of process, which govern all actions would of course apply. As this case demonstrates, moreover, St.1943, c. 57, as amended, itself effectively assures that mortgagors receive personal notification of impending foreclosures. Finally, we note that even if the mortgagor does violate the conditions of the mortgage and the mortgagee commences foreclosure proceedings, the mortgagor still may redeem the mortgaged property and obtain an accounting by appropriate proceedings before the foreclosure is completed. G.L. c. 244, §§ 18-36.[6] Indeed,

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[d] Mass.Adv.Sh. (1972) 771.

[6] No lack of notice or absence of opportunity to defend against the foreclosure is involved in this case and our discussion above suggests that a case presenting issues of such lack of notice or absence of opportunity to be heard in defense is unlikely to arise. Only if and when such a case arises would we have occasion to determine whether the due process clause even has any applicability to non-judicial mortgage foreclosures (i.e., those conducted by entry or by exercise of a power of sale), which follow private contractual provisions or the course of the common law. The substantial and growing weight

the petitioners have already brought an action in the Plymouth Superior Court, inter alia, an order that the mortgage be discharged. There would seem to be no obstacle to the filing of a motion to amend the presently pending action against Quinoil to seek an injunction against the foreclosure sale.

[10] The order appealed from is affirmed. The appeal being without merit and having accomplished no purpose except delay, the respondents are to have double costs of appeal.

So ordered.

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of authority in apparently analogous areas suggests that in fact no "state action" is present in such foreclosures. See, for example, Jackson v. Metropolitan Edison Co., ___ U.S. ___, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), (utility service termination); Bichel Optical Labs. v. Marquette Natl. Bank, 487 F.2d 906 (8th Cir. 1973) (self-help repossession under the Uniform Commercial Code); Adams v. Southern Cal. First Natl. Bank, 492 F.2d 324 (9th Cir. 1973) (repossession); Shirley v. State Natl. Bank, 493 F.2d 739 (2d Cir. 1974) (repossession); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974) (wage assignments); Nowlin Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974) (repossession); Fletcher v. Rhode Island Hosp. Trust Natl. Bank, 496 F.2d 927 (1st Cir. 1974) (bank setting of customers' deposits against indebtedness); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974) (repossession). Some authority, now apparently dwindling, does exist which finds "state action" in various self-help procedures. See, for example, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (landlords' liens); Boland v. Essex County Bank & Trust Co., 361 F.Supp. 917 (D.Mass.1973) (repossession). In one very recent case, Turner v. Blackburn, 389 F.Supp. 1250 (D.N.C.1975), a divided three-judge Federal court held that North Carolina's power of sale mortgage foreclosure proceedings constitute "state action." This holding appears to be based on a provision of the North Carolina law requiring a report of the sale to be filed with the clerk of the county court and to be audited and approved by him. A result contrary to that in Turner v. Blackburn, supra, was subsequently reached in Armeta v. Nussbaum, 519 S.W.2d 673 (Tex.Civ.App. 1975), where the court held that there was no "state action" in a mortgagee's power of sale under a Texas deed of trust.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK COUNTY
No. 017

COLIN F. BEATON and ELEANOR M. BEATON
v.
JUDGES OF THE LAND COURT, et al

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Colin Beaton and Eleanor Beaton, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Judicial Court of Massachusetts, affirming the order sustaining Demurrers, entered on April 10, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

By their attorney,
(s) DANIEL H. KELLEHER
DANIEL H. KELLEHER
73 Tremont Street
Boston, MA 02108
617/523-1310

CERTIFICATE OF SERVICE

I, Daniel H. Kelleher certify that on June 5, 1975 I served a copy of the foregoing Notice of Appeal on the Judges of the Land Court by mailing a copy, United States first class mail, postage prepaid to their counsel of record, Francis X. Bellotti, Attorney General, State House, Boston, Massachusetts and on Quinoil Industries, Inc. by

mailing a copy, United States first class mail, postage prepaid to its counsel of record, David Mortensen, Hale and Dorr, 28 State Street, Boston, Massachusetts. All parties required to be served have been served.

(s) DANIEL H. KELLEHER
DANIEL H. KELLEHER

Received
Supreme Judicial Court
for the Commonwealth
FREDERICK J. QUINLAN, *Clerk*
June 5, 1975

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. 74-125 LAW

COLIN F. BEATON
and ELEANOR M. BEATON
v.
JUDGES OF THE LAND COURT, ET AL.

ORDER SUSTAINING DEMURRERS

This matter came on for hearing on May 15, 1974, upon the demurrers of the respondents, and was argued by counsel. It appeared that by St. 1943, c. 57, §1, last sentence, as added by St. 1959, c. 105, §2, the proceedings in the Land Court are "limited to the issues of the existence of such persons [entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940] and their rights, if any." It would therefore be futile to order the acceptance for filing of an answer raising other issues. It is therefore ORDERED that the demurrers be, and they hereby are, sustained.

By the Court, (BRAUCHER, J.)
(s) JOHN E. POWERS, *Clerk*

Entered: May 16, 1974